1953

Silver King Coalition Mines Company et al v. Industrial Commission of Utah and Lorna Mitchell : Plaintiffs' Brief

Utah Supreme Court

Case No. 8029

IN THE SUPREME COURT of the STATE OF UTAH

SILVER KING COALITION MINES COMPANY, a corporation and CONTINENTAL CASUALTY COMPANY, a corporation,

Plaintiffs,

vs.

INDUSTRIAL COMMISSION OF UTAH and LORNA MITCHELL, Widow of Glade Mitchell, Deceased,

Defendants.

PLAINTIFFS' BRIEF

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PLAINTIFFS' BRIEF

STATEMENT OF FACTS

This case is here by certiorari to review an award of the Industrial Commission of Utah to Lorna Mitchell against the plaintiffs for the death of her husband claimed to be due to an occupational disease, to wit: silicosis.

The case was heard by the Industrial Commission January 28, 1953. On March 30, 1953, the Industrial Commission notified plaintiffs herein in writing that it had made and entered its decision awarding Lorna Mitchell compensation, medical and hospital expenses and burial allowance to be paid for by the plaintiffs herein; on April 24, 1953, plaintiffs applied to the Industrial Commission for rehearing which petition for rehearing, plaintiffs were notified on May 5, 1953, was denied. On May 28, 1953, this court on petition of plaintiffs issued a Writ of Certiorari to the Industrial Commission bringing the record before this court for review (R. 89, 92, and amended Certificate of Commission).

Glade Mitchell, the deceased husband of the applicant Lorna Mitchell, was employed by the plaintiff Silver King Coalition Mines Company from 1938 until June 15, 1949, on which date he left the employment and never worked thereafter. He died July 21, 1952, slightly more than three years and one month after leaving the employment of Silver King. Plaintiff Continental Casualty Company at all times herein applicable was the compensation carrier for Silver King (R. 9, 10).

Glade Mitchell died July 21, 1952, at 3:00 A. M., at the Utah State Tuberculosis Sanitorium located at Ogden, Utah, and on the same day at 8:45 P. M., an autopsy was performed on his body by Robert W. Ogilvie, Pathologist, witnessed by Dr. Elmer Kilpatrick and others (R. 53). The autopsy report states: "The cause

of death is believed to be due to a severe, chronic, fibrocaseocavernous pneumonitis, probably tuberculous, involving all lobes of both lungs and complicated by a mild to moderate nodular silicosis." (R. 54.) Prior to the autopsy there was never any diagnosis of the presence of silicosis. Numerous X-rays of this man were taken from time to time which were submitted by the Industrial Commission to the Department of Health of the Dominion of Canada for examination and report (R. 64). This report of the Canadian Department of Health shows the submission and examination of X-rays taken October, 1947, then December, 1948, followed by one in June of 1950, and a fourth one in December, 1950. The Canadian Clinician summarized his examination and opinion as follows:

> "There is nothing in the shadowing to suggest an occupation condition due to dust inhalation. The shadowing suggests an infectious process which may be: 1. A pneumonitis of unknown origin. 2. Pulmonary tuberculosis. 3. Histoplastmosis or some other form of fungus infection." (R. 64).

There were also examinations by the Medical Panel under our Occupational Disease Law on November 18, 1950 (R. 69), January 20, 1951 (R. 66), reports from Dr. Wilson on his X-rays showing no indication of silicosis (R. 72), a letter from Dr. Kilpatrick discussing the X-rays and the physical examinations of the employee

in which Dr. Kilpatrick stated under date of October 28, 1950, more than 2 years after the deceased left our employment:

> "Dr. Walker and myself feel that this man does not have clinical silicosis but he does have some infectious process in the lungs most likely tuberculosis but still not proven by bacteriology. Other causes for the lung disease might include mycotic infection or malignant disease metastatic from some area elsewhere in the body. If this latter process should be a condition involving the lungs, the source is not as yet evident.
>
> "In view of the complete review of this case we believe that Mr. Mitchell should be denied compensation at the present time, pending observation for at least another three to six months. We do not say that he has not had some silaceous dust in his lungs but we do feel that he does not have clinical silicosis which could be recognized as a disabling entity in any respect. On the other hand we are still not entirely able to make a definite dogmatic diagnosis. If his pulmonary condition should eventually prove to be tuberculous in origin and if his progress continues to be satisfactory, the infiltrates which are now evident by the X-ray film should largely clear up as his condition improves." (R. 74)

Dr. Kilpatrick's opinion of the results of the autopsy is not only interesting, but extremely important in this case. On August 26, 1952, he wrote to the Industrial Commission his views of the autopsy. Among other things he stated:

> "It was obviously present at the autopsy table that a clinical diagnosis from X-ray nodulation could not be made in this patient and it was both of our feelings (he and Dr. Ogilvie) that clinical silicosis did not exist. **********
>
> "From study of the complete autopsy report, microscopic analysis of the tissue, and chemical analysis of the tissues for silica it can be concluded that Mr. Mitchell did have silicosis in a comparatively minor degree, which seemingly has been a complication of his tuberculosis." (R. 3).

Even with the autopsy report there still is no clinical silicosis and such silicosis as is disclosed by microscopic and chemical analysis is of a comparatively minor degree.

There never was an X-ray of Glade Mitchell showing a characteristic X-ray pattern of silicosis, nor were there ever clinical manifestations of silicosis, nor does the autopsy report nor any of the other medical reports show the presence of silicosis (R. 41 and the other reports already specified) as defined in 35-2-28 UCA 1953, (same as 42-1a-29 UCA 1943), as follows:

> "For the purpose of this act 'silicosis' is defined as a chronic disease of the lungs caused by the prolonged inhalation of silicon dioxide dust (Si02) characterized by small discrete nodules of fibrous tissue similarly disseminated throughout both lungs, causing a characteristic X-ray pattern, and by variable clinical manifestations."

Section 35-2-29 UCA 1953, which is the same as Section 42-1a-30 UCA 1943, provides, "In case of disability or death from silicosis complicated with tuberculosis of the lungs, compensation shall be payable as for disability or death from uncomplicated silicosis." The record in this case discloses that silicosis per se is never fatal no matter what the degree of silicosis (R. 39).

Aside from the autopsy there is no evidence whatever that Glade Mitchell even had silicosis and the most that the autopsy discloses is that there was present "a mild to moderate nodular silicosis." The silicosis according to the autopsy was not complicated with tuberculosis, but the tuberculosis was complicated with a mild to moderate silicosis. Dr. Ogilvie states that the chemical analysis showed a considerable quantity of silicon dioxide "there being 12.84 milligrams per gram of dried node." The attorney for the applicant Mrs. Mitchell then asked Dr. Ogilvie:

> "Q. And I ask you whether or not that is in excess of the amount normally present?
> A. Not in a great deal of studies that have been made on nodes, as to silica content. So that such a question is difficult to interpret." (R. 27, 28).

This nodulation was not "similarly disseminated throughout both lungs" as is indicated by the following questions and answers by applicant's attorney to Dr. Ogilvie and his answers:

"Q. So that both of these samples, or specimens, were taken from the lung tissue, the gross lung?

A. Well, lung and hilar region. It's not a part of the lung itself.

Q. But it is a part of the respiratory system?

A. Well, it's right at the root of the lung, and receives the drainage of lymphatics from the lung tissue itself." (R. 28.)

It is true that Dr. Paul S. Richards, who was called as a witness for the plaintiffs and later was made a witness for the applicant, was questioned by the referee as follows:

"Q. Dr. Richards, were you a member of the committee which drew up the Utah Occupational Disease Disability Law?

A. Yes. And when I see other laws, I'm proud of it.

Q. I will call your attention particularly to Section 42-1a, on page 29 of the law, which is the definition of silicosis, and I will ask you if, in your opinion, the process which was demonstrated by autopsy meets that definition of silicosis.

A. Yes Sir." (R. 44, 45.)

The doctor was thus called upon to make a legal intrepretation of our statute although even the autopsy failed to disclose nodulation similarly disseminated throughout both lungs, and such nodulation as there was showed the

presence of silicosis only to a mild or moderate degree. Absent the autopsy all the evidence disclosed that the cause of this man's death no doubt was tuberculosis, and even the autopsy says that is a probable cause.

STATEMENT OF POINTS

POINT I.

THE COMMISSION ERRED IN HOLDING THAT SECTION 42-1a-13 (b) (3) UCA 1943, HAD NO APPLICATION, BUT THAT THE AMENDMENT OF 1951, NOW 35-2-13 (b) (3) UCA 1953 WAS APPLICABLE.

POINT II.

THE COMMISSION ERRED IN HOLDING THAT THE EVIDENCE DISCLOSES THAT THE DECEASED DIED AS A RESULT OF SILICOSIS AS DEFINED BY THE LAWS OF UTAH.

ARGUMENT

POINT I.

THE COMMISSION ERRED IN HOLDING THAT SECTION 42-1a-13 (b) (3) UCA 1943, HAD NO APPLICATION, BUT THAT THE AMENDMENT OF 1951, NOW 35-2-13 (b) (3) UCA 1953 WAS APPLICABLE.

The deceased left our employment June 15, 1949. He never worked again, was repeatedly examined clinically and by X-ray, and died July 21, 1952, a little more than three years and one month after he left our employment (R. 9, 10). While he was employed by us and at the

time he left our employment, Section 42-1a-13 (b) (3) UCA 1943 was in effect and provided as follows:

> "No compensation shall be paid for death from silicosis unless the death results within two years from the last day upon which the employee actually worked for the employer against whom compensation is claimed, except in those cases where death results during the period of continuous total disability from silicosis for which compensation has been paid or awarded, and in such cases compensation shall be paid if such death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed."

No compensation was ever paid or awarded to the employee.

In 1951 this section was amended and is now found in UCA 1953 as 35-2-13 (b) (3). The amendment added a new provision reading as follows:

> "or (b) in those cases where death results from silicosis complicated by active tuberculosis and such silico-tuberculosis is evidenced by positive laboratory sputum tests and X-rays and other clinical findings, and in such cases compensation shall be paid if such death results within five years from the last day upon which the employee actually worked for the employer against whom compensation is claimed."

(Under Point II we shall contend that the evidence here does not even comply with this provision, but for

the purpose of discussing Point I we will assume that the statute was amended to extend the period from two years to five years.)

The court will note that the foregoing statutes impose on every employer a liability for the payment of compensation to dependents of employees whose death results from an occupational disease and the provisions of the statute authorizing recovery also specify as a part of the right the time within which the action shall be brought. The courts of this country uniformly hold that such limiting provisions are not statutes of limitation but are qualifications and conditions restricting the rights granted by the statutes and must be strictly complied with. They cannot be made retroactive. The Supreme Court of the United States in *Western Fuel Company vs. Garcia,* 257 U. S. 233, 66 L. Ed. 210, specifically held that the limitation of time in the death statute was not a statute of limitation, but was a part of the right itself. Likewise, the Supreme Court of Michigan in *Bement vs Grand Rapids and I Ry. Co.,* 160 N. W. 424, declared that when a statute creates a right conditioned on its enforcement within a specified time that is not a limitation of remedy but is a part of the right itself; that the time specified is a limitation of the liability itself.

See also *Mejia vs. U. S.* 152 Fed. (2d) 686 (5th Cir. La. 1946), *Sebol vs. Pecoe,* 76 N. E. (2d) 84 (Ohio, 1947).

This court held in *Pacific Employers Insurance Company vs. Industrial Commission,* 108 U 123, 157 P. (2d) 800, 803, that the date of the last exposure is the date which fixes the liability of the employer and consequently also attaches liability to the employer's insurance carrier as of that date. The last exposure was June 15, 1949.

Our statute 68-3-3 UCA 1953 provides that "No part of these revised statutes is retroactive, unless expressly so declared." There is not such declaration in the 1951 amendment, nor in the 1953 Code. It seems quite clear that the statute creating the right also limited the time for its application; that time expired and with it expired the right.

This employee terminated his employment with us June 15, 1949. At that time the law provided that his death must occur within two years from the termination of his employment in order to hold us liable. The time period in the statute was a part of the dependents' rights and a part of our liability and it became fixed when the basis of the right, the employment, was terminated.

The only way that we could be held liable at all would be because of the existence between us and the deceased of the employer-employee relationship. That relationship is the basis of the right. When that relationship ends our liability is fixed as are also the rights of the employee and his dependents. No subsequent legis-

lation could operate to increase our liability or decrease the employee's rights. They were fixed. As was correctly ruled by the Supreme Court of Connecticut in *Quilty vs. Connecticut Company,* 113 Atl. 149 (1921). The claimant urged that the statute was merely procedural, that the right to compensation did not arise until death. Between the injury and death the law was materially amended and the claimant contended for recovery under the amendment. However, the Connecticut Court held that as the right to compensation arises from the employer-employee relationship, the time limit was a substantive obligation and that a later amendment cannot alter or extend the rights and liabilities. See also *Atamanick vs. Real Estate Management,* New Jersey, 1952, 91 Atl. (2d) 268.

Stanswsky vs. Industrial Commission (Ill., 1931) 176 N. E. 898 followed by *Playhouse Theatre vs. Industrial Commission,* 179 N. E. 89 (Ill., 1932), hold that the rights and liabilities are fixed at the date of injury not the death. If between injury and death the statute is amended and the right to an award because of death occurs after the amendment, the law as it existed prior to the amendment is controlling and not the amendment. See also *Draper vs. Draper & Sons,* 195 N. Y. S. 162. *Thorpe vs. Department of Labor and Industries of Washington* (1927) 261 P. 85, holds that the amount of the award for death of an employee is governed by the law in force at the time of injury and not those in force at the time of death. The Supreme Court of Wyoming

in the case of the *Claim of Heil,* 197 P. (2d) 692, at page 696 discusses a New York case, *Schmidt vs. Wolfe Contracting Company,* 55 N. Y. S. (2d) 162, frequently cited as an authority giving retrospective effect to compensation statutes and concludes that that case is out of harmony with every other jurisdiction and that twenty states and national jurisdictions uphold the rule that a compensation statute is never given retroactive effect and "assuming that the legislature had the power to make the law of 1927 applicable to claims for injuries sustained before its enactment we should not give it that construction if it be susceptible of any other."

In *Riggs vs. Lehigh Portland Cement Co.,* (1921) 131 N. E. 231, the Indiana Court states the reason for the rule as follows:

> "To permit subsequent legislation to increase or diminish the compensation specified in awards would be to strike down vested rights. Then no one would be secure. The resulting uncertainty, distrust and confusion would destroy the compensation plan itself. To give to the amendment the effect desired by the appellant would be to confer on the child a substantive right which she did not possess at the time of the injury and death of her father, and to impose on the employer a burden not imposed by the law at that time, and would be giving an unwarranted retroactive effect to the amendment."

It must be remembered that in this state the right to recover for death from an occupational disease is

purely statutory. Under the workman's compensation law the legislature was prohibited until the 1921 constitutional amendment from abrogating actions for death from injuries which, of course, means actions for negligence causing death. In 1921 the constitution was amended to give the legislature the right in compensation cases to legislate for death from injuries. However, this constitutional amendment has no application to occupational diseases as we are concerned with them in the case at bar.

There is no attempt in the case at bar to hold the Silver King Coalition Mines Company guilty of negligence in causing the alleged silicosis or tuberculosis which were the reported causes of death. The action here is purely statutory with no reference whatsoever to the constitution or the amendment thereto in 1921. The applicant, the widow of the employee, is solely dependent upon the statute for any right that she has. The statute that granted her the right only because of the employer-employee relationship also specified the limits of our liability arising from that relationship. When that relationship ended, her rights and our liability were fixed.

Even in workman's compensation cases we have seen that the courts hold that because the liability arises from the employer-employee relationship, the rights are fixed by law at the date of the injury and a subsequent statutory amendment can neither enlarge nor diminish them. This court recently discussed the effect of the

constitutional amendment in *Henrie vs. Rocky Mountain Packing Corporation,* 113 U. 415, 196 P. (2d) 487. But, of course, that case is not in point here. If the employee had pressed his claim for compensation during his lifetime undoubtedly it would have been denied on the basis of the record now before this court since he would have had no evidence whatever of an occupational disease as defined by our statute. There was no award of compensation and no compensation had been paid. The death occurred more than two years after he left our employment. The applicant's rights expired before the employe's death.

POINT II.

THE COMMISSION ERRED IN HOLDING THAT THE EVIDENCE DISCLOSES THAT THE DECEASED DIED AS A RESULT OF SILICOSIS AS DEFINED BY THE LAWS OF UTAH.

Point II is probably not too important in this case since clearly the applicant's right expired long before the death of her husband. However, it would be helpful if this court would tell us whether or not the definition of silicosis in our Code means what is says. It must be assumed that the legislature knew what it was doing when it passed the Occupational Disease Statute defining silicosis in specific terms.

Apparently the legislature when it first enacted the Occupational Disease Statute felt that silicosis as a cause

of death was very questionable. Dr. Paul S. Richards in this case as we have already pointed out, says that uncomplicated silicosis is never a cause of death. The legislature definitely did not allow recovery for death from tuberculosis. It apparently felt, however, that if the employee had become afflicted with silicosis, and that then tuberculosis ensued as a result, there should be a recovery. It is somewhat anomalous to learn that Dr. Richards helped to draw the Occupational Disease Law which provides that when silicosis is complicated with tuberculosis of the lungs the compensation shall be payable as for disability or death from *uncomplicated* silicosis, when Dr. Richards expressly testifies that there is never death or injury from uncomplicated silicosis. Be all that as it may, our statute says that silicosis to be compensable must cause a characteristic X-ray pattern; that it must be similarly disseminated throughout both lungs, that there must be "variable clinical manifestations." None of these requirements appear here. Even the amendment of 1951 requires in order to apply the five-year provision that there be, "or (b) in those cases where death results from silicosis complicated by active tuberculosis *and* such silico-tuberculosis is evidenced by positive laboratory sputum tests *and* X-rays *and* other clinical findings." (Emphasis added.) In this case there were no positive sputum tests, there were no X-ray findings, no clinical finding, variable or otherwise, so that there is no evidence of the existence of silicosis as defined in the Occupational Disease Act.

It seems to us that the facts in this case clearly demonstrate the reason for the requirements in the legislative definition. If silicosis is to be considered as a death causing factor it must be of such an extent that it will be disclosed by an X-ray, it must be extensive, it must be similarly disseminated throughout both lungs, there must be clinical evidence. In the case at bar the silicosis did not even appear in an X-ray and such findings as we have, not clinical but microscopic and chemical, show only the presence of a mild to moderate silicosis. The legislature must have felt that under such circumstances silicosis could not be the cause of death, and therefore, the employer should not be subjected to liability in a case such as we have here.

CONCLUSION

We respectfully submit that the applicant's claim for compensation never did arise and that under the evidence in this case there is no silicosis for which compensation could be paid. The award of the Industrial Commission should be vacated.

Respectfully submitted,

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